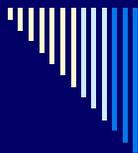


OSHA'S General Duty Clause

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General Duty Clause

- ❑ **Section 5(a)(1) of the Act requires that “Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”**
 - ❑ **Necessary elements to prove a violation of the general duty clause:**
 - ▶ **The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;**
 - ▶ **The hazard was recognized;**
 - ▶ **The hazard was causing or was likely to cause death or serious physical harm; and**
 - ▶ **There was a feasible and useful method to correct the hazard.**
 - ❑ **A general duty citation must involve both the presence of a serious hazard and exposure of the cited employer's own employees.**
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General Duty Clause

- “The occurrence of an accident/incident does not necessarily mean that the employer has violated Section 5(a)(1), although the accident/incident may be evidence of a hazard.”
- “The citation shall address the **hazard in the workplace that existed prior to the accident/incident**, not the particular facts that led to the occurrence of the accident/incident.”
- “The hazard for which a citation is issued must be reasonably foreseeable. All of the factors that could cause a hazard need not be present in the same place or at the same time in order to prove foreseeability of the hazard; e.g., an explosion need not be imminent.”
 - *It is necessary to establish the reasonable foreseeability of the workplace hazard, rather than the particular circumstances that led to an accident/incident.*



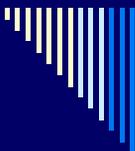
General Duty Clause

- The fact that an employer denies that exposed workers are his/her employees is not necessarily determinative of the employment relationship issue.
 - DOL is generally focusing on erroneous classification of workers for OSHA, MSHA and Wage/Hour purposes.
- Whether or not exposed persons are employees of an employer depends on several factors, the most important of which is who controls the manner in which the employees perform their assigned work.
 - The question of who pays employees in and of itself may not be the determining factor to establish a relationship.



General Duty Clause

- Recognition of a hazard can be established on the basis of employer recognition, industry recognition, or “common-sense” recognition.
- Evidence of employer recognition may consist of written or oral statements made by the employer or other management or supervisory personnel during or before the OSHA inspection.
- Employer awareness of a hazard may also be demonstrated by a review of company memorandums, safety work rules that specifically identify a hazard, operations manuals, standard operating procedures, and collective bargaining agreements. In addition, prior accidents/incidents, near misses known to the employer, injury and illness reports, or workers' compensation data, may also show employer knowledge of a hazard.



General Duty Clause

- Employer awareness of a hazard may also be demonstrated by prior Federal OSHA or OSHA State Plan State inspection history which involved the same hazard.
- Employee complaints or grievances and safety committee reports to supervisory personnel may establish recognition of the hazard, but the evidence should show that the complaints were not merely infrequent, off-hand comments.
- An employer's own corrective actions may serve as the basis for establishing employer recognition of the hazard if the employer did not adequately continue or maintain the corrective action or if the corrective action did not afford effective protection to the employees.



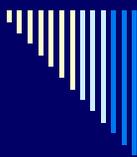
General Duty Clause

- A hazard is recognized if the employer's relevant industry is aware of its existence.
 - Recognition by an industry other than the industry to which the employer belongs is generally insufficient to prove this element of a Section 5(a)(1) violation.
- Although evidence of recognition by an employer's similar operations within an industry is preferred, evidence that the employer's overall industry recognizes the hazard may be sufficient.



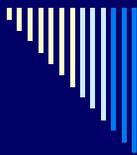
“Industry Recognition”

- Industry recognition of a hazard can be established in several ways:
 - Statements by safety or health experts who are familiar with the relevant conditions in industry (regardless of whether they work in the industry);
 - Evidence of implementation of abatement methods to deal with the particular hazard by other members of the industry;
 - Manufacturers' warnings on equipment or in literature;
 - Statistical or empirical studies conducted by the employer's industry that demonstrate awareness of the hazard.
 - Evidence such as studies conducted by the employee representatives, the union or other employees must also be considered if the employer or the industry has been made aware of them;



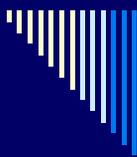
“Industry Recognition”

- Government and insurance industry studies, if the employer or the employer's industry is familiar with the studies and recognizes their validity;
- State and local laws or regulations that apply in the jurisdiction where the violation is alleged to have occurred;
- If the relevant industry participated in the committees drafting national consensus standards such as the American National Standards Institute (ANSI), the National Fire Protection Association (NFPA), and other private standard-setting organizations, this can constitute industry recognition.
 - Otherwise, such private standards normally shall be used only as corroborating evidence of recognition.



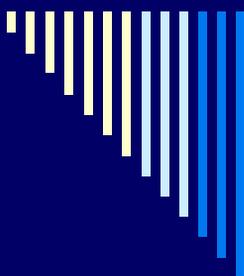
Conclusion

- OSHA will make greater use of GDC for:
 - Ergonomics
 - Workplace Violence
 - Possibly for health hazards such as H1N1
 - Combustible Dust
 - Anything for which the agency currently has no standards.



Conclusion

- OSHA Head David Michaels has made clear his preference to expand the use of the General Duty Clause: “OSHA doesn’t need a new standard if a hazard is serious and there are recognized measures to mitigate the hazard.”
 - There are limitations on GDC liability, including the requirement that the employer’s own workers must be exposed to the hazard.
 - OSHA can use “willful” classifications for GDC violations.
 - Key to defense is what “reasonable employer” would recognize as hazard, and raise issues of “fair notice and due process”
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QUESTIONS?

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